

# IS IT WORTH THE PAPER IT'S WRITTEN ON?: EXAMINING SMALL CLAIMS COURT JUDGMENT ENFORCEMENT IN CANADA AND THE UNITED STATES

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## I. INTRODUCTION

Canada and the United States are neighbors, major trading partners<sup>1</sup> and parties to one of the most important free trade agreements on the planet.<sup>2</sup> Two-way trade across the Canada–U.S. border is valued at \$1.7 billion a day — well over a million dollars a minute.<sup>3</sup> On an individual level, Canadian and United States residents move with relative ease<sup>4</sup> across the largest undefended border in the world.<sup>5</sup> Ninety percent of Canadians live within 100 miles of the Canada – U.S. border. Over 200 million crossings occur each year, more than 250,000 daily.<sup>6</sup> In 2007, 11.2 million Americans made same day trips to Canada, while 24.2 million Canadians visited the United States for a day.<sup>7</sup> The natural consequence of this mobility is the creation of hundreds of millions of commercial and consumer transactions<sup>8</sup> involving residents from the two countries, some of which will go into default. Businesses on both sides of the border need to be aware of the various Canadian and U. S. processes in place for collection of outstanding debts.

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<sup>1</sup> Canada is the United States' top trading partner accounting for 16.5% of total international trade in 2010; China is a close second at 14.5%. See U.S. Census Bureau Foreign Trade Statistics, <http://www.census.gov/foreign-trade/statistics/highlights/top/top1012yr.html> (last visited April 9, 2012). The United States is Canada's primary trading partner taking over 77% of its exports and supplying over 52% of its imports: see OECD Statistical Data on International Trade, <http://stats.oecd.org/Index.aspx?DataSetCode=TRADEINDMACRO> (last visited April 22, 2011).

<sup>2</sup> North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) (NAFTA).

<sup>3</sup> Michael Wilson, Canadian Ambassador to the United States, *The World's Longest Undefended Border: Gateway or Checkpoint? the Post-9/11 Era*, address at the Canada-United States Law Institute Annual Conference, (April 18, 2008) (transcription available at <http://www.canadainternational.gc.ca/washington/offices-bureaux/amb/080418.aspx?lang=eng>) (last visited April 23, 2011). The remarks were made to stress the importance of balancing trade needs with security in the management of the shared border.

<sup>4</sup> Prior to September 11, 2001, individuals could cross into either country without a passport; any government issued photo identification, e.g. a driver's licence, was sufficient. In the post-9/11 era passports are required and some slowing has occurred. Visas are not required for visits of less than 6 months. Regular crossings can be expedited by obtaining a NEXUS card: see <http://canadavisa.ca> (last visited April 23, 2011). For a discussion of the impact of border delays on trade see Trien T. Nugyen & Randall M. Wigle, *Border Delays Re-Emerging Priority: Within-Country Dimensions for Canada*, 37(1) CAN. PUB. POLICY 49-59 (2011).

<sup>5</sup> Facts About Canada, <http://canadavisa.ca/facts-about-canada> (last visited April 23, 2011); See also, Wilson, *supra* note 3 (describing the characteristics of the border).

<sup>6</sup> Heenan Blaikie, *Securing North America in the Aftermath of 9-11*, 12(2) LABOUR & EMPL. (March 2002), <http://www.heenan.ca/eng/publications/item?id=36> (last visited April 23, 2011) (one can assume that these numbers have risen since 2002).

<sup>7</sup> *By the Numbers*, CBC NEWS, May 11, 2009, <http://www.cbc.ca/news/canada/story/2009/05/11/f-border-by-the-numbers.html> (last visited April 23, 2011) The number of Canadians making same day visits (24.2 m.) is staggeringly high relative to Canada's total population of 32.9 million in 2007. See Stats Canada, <http://www.statcan.gc.ca> (last visited April 23, 2011).

<sup>8</sup> This statement is derived from a very conservative estimate that each of the 200 million crossings generates at least one purchase by the visitor while in the other country.

In today's difficult economic climate, debt collection is a high business priority and a nightmare for many consumers.<sup>9</sup> Canadian and U.S. small claims courts figure prominently in many debt collection scenarios.<sup>10</sup> In both countries, small claims court judgment enforcement is identified as one of the most problematic and sensitive functions of the court.<sup>11</sup> Creditors and debtors face difficult challenges as the post-judgment debt collection process unfolds. Valuable time and money can be wasted by creditors in unsuccessful attempts to find the assets of uncooperative debtors. Conversely, only minor accommodation is available to debtors sincerely trying to satisfy multiple obligations with limited resources.<sup>12</sup> Access to justice requires that meaningful outcomes be achieved through fair processes. In the post-judgment context, this means maintaining a delicate balance between maximizing compliance while minimizing undue hardship. Although efficient and effective enforcement of monetary judgments is important to the proper functioning of the marketplace, individual debtors should not be rendered "financially

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<sup>9</sup> For a sensational and highly critical newspaper series on collection in the Massachusetts Small Claims Court see *Debtors Hell, Part 1: Preying on Red Ink America*, July 30, 2006, *Part 2: A Court System Compromised*, July 31, 2006, *Part 3: Behind the Badge*, Aug. 1, 2006, *Part 4: National Crisis Official Silence*, Aug. 2, 2006, BOSTON GLOBE, available at <http://www.boston.com/news/specials/debt/> (last visited Feb. 12, 2011). For a less dramatic discussion of debt collection in the small claims court see Terence G. Ison, *Small Claims Court*, 35(1) MODERN L. REV. 18–37, 18 (1972).

<sup>10</sup> See as to Canada: LISTENING TO ONTARIANS: REPORT OF THE ONTARIO CIVIL LEGAL NEEDS PROJECT, 19 (Ontario Civil Legal Needs Steering Committee, 2010) available at [http://www.lsuc.on.ca/media/may3110\\_oclnreport\\_final.pdf](http://www.lsuc.on.ca/media/may3110_oclnreport_final.pdf) (last visited Feb. 14, 2011) (reporting that 82% of respondents believe courts are important in the resolution of civil disputes)(OCLN); See as to U.S.: Jennie Long, *Compliance in Small Claims Court: Exploring the Factors Associated with Defendants' Level of Compliance with Mediated and Adjudicated Outcomes*, 21(2) CONFLICT RESOL. Q. 139, 151 (2003) (interviewing U.S. small claims court users and finding that primary reason for compliance was to obey the law). For a discussion of the economic importance of a small claims debt collection system see George Haibach, *The Commission Proposal for a Regulation Establishing a European Small Claims Procedure: An Analysis*, 4 EUR. REV. PRIVATE L. 593, 594 (2005) (suggesting that inconsistent access to an effective small claims debt collection process gives some European Union member states an unfair economic advantage and interferes with the proper functioning of the internal market).

<sup>11</sup> MARC W. PATRY ET AL., EVALUATION OF THE NOVA SCOTIA SMALL CLAIMS COURT: FINAL REPORT TO THE NOVA SCOTIA LAW REFORM COMMISSION 85 (St. Mary's University, 2009) available at <http://www.lawreform.ns.ca/Downloads/SmallClaimsFinaReportFINAL.pdf> (last visited Feb. 12, 2011) (survey of small claims court stakeholders finding that by far "the most common theme from the comments were negative statements regarding enforcement" (35%)). Suzanne E. Elwell & Christopher D. Carlson, Note, *The Iowa Small Claims Court: An Empirical Analysis*, 75 IOWA L. REV. 433, 450, 512-525, n. 109-115 (1990) (suggesting uncollected judgments are the most serious failing of the court, also finding the majority of judgment creditors had difficulty with the collection process and 61.1% of monetary judgments awarded remained completely unpaid after one year); JOHN. C. RUHNKA ET AL., SMALL CLAIMS COURTS: A NATIONAL EXAMINATION 161-69 (National Center for State Courts, 1978) available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/civil&CISOPTR=0> (last visited Sept. 6, 2009); Arthur Best et al., *Peace, Wealth, Happiness, and Small Claim Courts: A Case Study*, 21 FORDHAM URB. L. J. 343, 365-366 (1994) (labelling collection of judgments as the single greatest problem with small claims court and finding 55% of judgment creditors collected nothing).

<sup>12</sup> See, e.g., wage garnishment caps which exist in both the U.S. and Canada, see *infra* notes 48, 60, and accompanying text.

dysfunctional” by the process.<sup>13</sup> Developing a collection model that reflects both priorities remains a challenge for many Canadian and U.S. jurisdictions.

The standard collection tools available to creditors in both countries include writs of seizure and sale affecting land or goods and garnishments of wages or bank accounts. These tools, however, are useless unless the creditor is aware of the location of the debtor’s assets and sources of income. Mechanisms available to assist creditors in the search for assets often fall short of creditor expectations.<sup>14</sup> On the other hand, debtors who voluntarily supply asset information should not be subject to the indiscriminate use of collection tools without checks and balances which recognize and accommodate the unique circumstance of each debtor. Without such accommodation, debtors will perceive the system as harsh and unfair and may lose desire to fulfill their obligations.<sup>15</sup> This paper focuses on two components of the post-judgment phase in particular – the assistance available to creditors to locate debtor assets and the flexibility within the system to accommodate a debtor’s circumstances. It examines the varying enforcement processes in several key U.S. jurisdictions in order to identify innovative approaches for fair and effective judgment collection and makes reasoned recommendations for reform in both Canada and the United States.

## II. ACCESS TO JUSTICE AND THE SMALL CLAIMS COURT

Access to justice<sup>16</sup> is the oft cited rationale for the existence of small claims court.<sup>17</sup> It is a multi-faceted concept involving principles of procedural and substantive fairness and the elimination or reduction of barriers to use.<sup>18</sup> The traditional small claims court mantra describes quick, easy, and inexpensive dispute resolution, and to this end, much attention has been paid to the pre-judgment

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<sup>13</sup> TAMARA C. BUCKWOLD & RONALD C. CUMING, MODERNIZATION OF SASKATCHEWAN MONEY JUDGMENT ENFORCEMENT LAW, FINAL REPORT TO THE LAW FOUNDATION OF SASKATCHEWAN 2 (University of Saskatchewan, 2005), available at [http://www.qp.gov.sk.ca/orphan/JE\\_Final\\_Report.pdf](http://www.qp.gov.sk.ca/orphan/JE_Final_Report.pdf) (last visited May 11, 2011) (recommending reforms to the collection process in superior civil courts).

<sup>14</sup> See Patry, *supra* note 11, at 82 (reporting 63.2% of judgment creditors responding had trouble collecting their judgments); Elwell & Carlson, *supra* note 11, at 520-22 (finding the majority of judgment creditors responding had difficulty in collection phase); Best, et al., *supra* note 11 at 364 (reporting many found the complexity of the collection process led many respondents to hire attorneys).

<sup>15</sup> See Long, *supra* note 10, at 150 (finding willingness to voluntarily comply with adjudicated outcomes related to desire to obey the law and perceptions of fairness).

<sup>16</sup> See William E. Conklin, *Wither Justice? The Common Problematic of Five Models of “Access to Justice”*, 19 WINDSOR Y.B. ACCESS JUST. 297, 313-316 (2001) (describing five access to justice models and the relevance of legal rules and structure); Roderick A. Macdonald, *Access to Justice and Law Reform #2*, 19 WINDSOR Y.B. ACCESS JUST. 317, 319-321 (differentiating between access to justice and access to the courts).

<sup>17</sup> See, e.g., Grover v. Hodgins, 2011 ONCA 72 46-49 (Ont. C.A.); Pace v. Hillcrest Motor Co., 101 Cal.App. 3d 476, 478 (1980); Best et al., *supra* note 11, at 343-344; Christopher S. Axworthy, *Controlling the Abuse of Small Claims Court*, 22 MCGILL L.J. 480, n. 2 (1976); Seana C. McGuire & Roderick A. Macdonald, *Small Claims Court Cant*, 34 OSGOODE HALL L.J. 509, 511, n. 3 (1996); Jacob Ziegel, *Canadian Consumer Law and Policies 40 Years Later: A Mixed Report Card*, 50 CAN. BUS. L.J. 259, 287-92 (2010) (evaluating success of consumer access to justice initiatives).

<sup>18</sup> Faisal Bhabha, *Institutionalizing Access-to-Justice: Judicial, Legislative and Grassroots Dimensions*, 33 QUEEN’S L.J. 139, 145 (2007) (describing access to justice initiatives as having three sources – judicial, legislative and societal).

process.<sup>19</sup> Features such as simplified forms, limited discovery, and streamlined trial formats aim at making the process as easy to use as possible without sacrificing the fairness of the outcome.<sup>20</sup> Low fees, fee waivers, and capped cost awards control the expense and thereby reduce cost barriers.<sup>21</sup> Considerable emphasis has been put on the design of the pre-judgment process in the hope of furthering the “access to justice” goals of the court. It is now time to re-consider the post-judgment enforcement process in light of these same “access to justice” criteria – fairness and barriers to use. A dispute cannot be considered finally “resolved” until outstanding debts are collected. Justice requires that outcomes be honored and therefore the life cycle of a dispute includes post-judgment collection.<sup>22</sup>

When applied to the post-judgment phase, the access to justice goals of fairness and user friendly processes suggest that judgments must be honored, respected, and enforced through easy to use and fair collection processes. A middle ground must be found between “debtors’ prison”<sup>23</sup> and judgments “not worth the paper they are written on”.<sup>24</sup> The small claims court context makes judgment enforcement more delicate than for superior courts. Very often one or both litigants are unrepresented and, therefore, lack experience and familiarity with the process. Successful access to the process should not depend on party expertise or representation but should be within reach of all parties irrespective of their skill level. By definition the amount to be collected is small; therefore, the amount of money and time a creditor may be willing to invest in its collection is limited.<sup>25</sup> From a debtor’s perspective, the small amount of the debt may, in the mind of the debtor, trivialize the importance of paying it or give the false impression that the associated court processes are also of minor importance. Scholars looking at the problem have concluded that reform is necessary and

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<sup>19</sup> Shelley McGill, *Small Claims Court Identity Crisis: A Review of Recent Reform Measures*, 49(2) CAN. BUS. L.J. 213, 217–18 (2010); McGuire and Macdonald, *supra* note 7, at 511.

<sup>20</sup> McGill, *supra* note 19, at 218-19.

<sup>21</sup> McGill, *supra* note 19, at 231-34.

<sup>22</sup> See Neil Vidmar, *The Small Claims Court: A Reconceptualization of Disputes and An Empirical Investigation*, 18(4) LAW & SOC’Y REV. 515, 531-36, 542-45 (1984) (connecting the success in collecting a judgment with the substantive success of a defence advanced (full or partial success)). Jennie J. Long, *Compliance in Small Claims Court: Exploring the factors Associated with Defendants’ Level of Compliance with Mediated and Adjudicated Outcomes*, 21(2) CONFLICT RESOL. Q. 139, 147-49 (2003) (also connecting a disputant’s desire to bring the dispute to an end and perception of fairness of the outcome with willingness to satisfy with the judgment); Terence G. Ison, *Small Claims*, 35(1) MODERN L. REV. 18, 18-19, 35-36 (1972) (describing collection rather than adjudication as the primary function of the court with respect to consumer transactions and identifying abuses in the collection process).

<sup>23</sup> A reference to the 19<sup>th</sup> century practice of imprisoning poor people who could not pay their debts. The practice was considered a violation of fundamental rights and has been abolished in most common law jurisdictions: see, e.g., OKLA. CONST. art. II § 13 (Bill of Rights). Willful refusal to pay a court ordered indebtedness when one has the means to pay is a different matter.

<sup>24</sup> A common saying meaning “worthless” as paper is of such low value.

<sup>25</sup> Both U.S. states and Canadian provinces have time limits within which judgments must be collected. See, e.g., as to Canada: see Rules of the Small Claims Court, O. Reg. 258/98, R. 20.08(2.1) (Ont.) (if more than 6 years have passed since the order of payment then a garnishment will only be issued with leave of the court); see, e.g., as to U.S.: CAL. CIV. PROC. CODE § 683.020 (Deering 2010) (judgments expiry after 10 years subject to renewal).

reform recommendations have been made including pre-judgment financial disclosure and more court initiated involvement.<sup>26</sup> For the most part, these suggestions have been ignored.

The design of a small claims court enforcement process must be more than just a mirror of the superior court model where the burden of judgment collection is borne by the judgment creditor.<sup>27</sup> Judgment debtors must feel safe participating in the post-judgment process without representation and the involvement of the court as neutral overseer is more important in this context. A recent survey on the civil legal needs of Ontarians concluded that access to justice cannot be delivered in a one size fits all model.<sup>28</sup> In that spirit, the small claims court must take a customized approach to judgment enforcement. Lessons can be learned from the comparison and examination of the enforcement processes in place in various Canadian and U.S. jurisdictions.

### III. THE CANADIAN ENFORCEMENT SYSTEM

In Canada, the administration of justice is a matter of provincial jurisdiction and the specific features and design of the various courts differ across the country – monetary limits,<sup>29</sup> eligible disputes and disputants,<sup>30</sup> status of adjudicator,<sup>31</sup> and available remedies<sup>32</sup> are not uniform.<sup>33</sup> Still, the various jurisdictions share a common frustration with post-judgment enforcement proceedings and, for the most part, the judgment creditor must collect a judgment with little assistance from the court.

Low compliance rates and limited debtor cooperation plague the process and threaten the integrity of the court. Some provinces have surveyed users on satisfaction with the system. For example, a recent review of the Nova Scotia Small Claims Court identified judgment enforcement as one of the greatest failings of the court finding that as many as 63% of creditors

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<sup>26</sup> Patry, *supra* note 11, at 90-93. *See also* JOHN C. RUBENKA ET AL., SMALL CLAIMS COURTS: A NATIONAL EXAMINATION, 172-73 (National Center for State Courts, 1978), available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/civil&CISOPTR=0> (last visited April 23, 2011) (studying U.S. small claims court and calling for more court involvement); Roderick A. Macdonald, *Access to Justice in Canada Today: Scope, scale and ambitions*, in ACCESS TO JUSTICE FOR A NEW CENTURY: THE WAY FORWARD, 68-69 (Julia Bass, William A. Bogart & Frederick Zemans, eds, 2005) (studying civil judgment generally and making radical recommendations including freezing “a debtor’s assets prior to trial”); Best et al., *supra* note 11, at 378.

<sup>27</sup> *See e.g.*, Buckwold & Cuming, *supra* note 13 (describing the existing limitations of the superior court system in Saskatchewan, Canada).

<sup>28</sup> OCLN, *supra* note 10, at 4. Ontario is the most populated and commercial of all the provinces and territories in Canada; over 13,000,000 of the 34,000,000 Canadians live in Ontario. *See* Statistics Canada, <http://www.statcan.gc.ca/daily-quotidien/100929/dq100929b-eng.htm> (last visited Feb. 12, 2011).

<sup>29</sup> McGill, *supra* note 19, Appendix 1 (summarizing and comparing the features of the various provincial small claims court systems). The administration of justice is an area of provincial jurisdiction; *see* Constitution Act, 1867, 30 & 31 Vict. Ch. 3, § 91-92 (U.K.), as reprinted in R.S.C., No. 5 (Appendix 1985) (Can.).

<sup>30</sup> McGill, *supra* note 19, at 228-30.

<sup>31</sup> *Id.*, at 239-42.

<sup>32</sup> *Id.*, at 242-43.

<sup>33</sup> *Id.*, at 252 (Appendix 1 is a cross country comparison of features).

were dissatisfied with the process and experienced difficulty with collection.<sup>34</sup> In Prince Edward Island (PEI), government concern over low compliance with judgments prompted an Auditor General<sup>35</sup> review of post judgment processes. Among the deficiencies noted was a lack of information about post-judgment collection.<sup>36</sup> Resulting P.E.I reforms include the creation of a system to track post-judgment compliance and the required filing of a satisfaction document.

Ontario has struggled of late to find the appropriate way to ensure debtor participation in the post-judgment debtor (JD) examination process without appearing abusive. Following the issue of a judgment, a creditor may request that a debtor appear before the court to answer questions about his or her financial circumstances and ability to pay the judgment. The process for handling a failure to appear has been a source of conflict. Prior to 2006, the rules of the court provided that failure to appear could be considered *ex facie*<sup>37</sup> contempt of court and the absentee debtor should be summoned to appear for a contempt hearing.<sup>38</sup> The rules further provided that absence at the subsequent contempt hearing could trigger a warrant of committal for no longer than 40 days.<sup>39</sup> In practice, few, if any, debtors were ever committed for 40 days, and the more usual length was only a few days. Still, difficulty making the fine distinction between punishment for the failure to appear, rather than for the non-payment of the debt, led some critics to envision debtors' prison.<sup>40</sup>

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<sup>34</sup> Patry, *supra* note 11, at 82, 85, 90. As already noted, Ontario recently undertook a survey of civil legal needs, (not only small claims court): see OCLN, *supra* note 10. Previous civil justice reviews in Ontario found general satisfaction with the system but did not focus on the enforcement processes. See, e.g., Coulter Osborne, Civil Justice Reform Project: Summary of Findings & Recommendations, 15-21 (Ontario Ministry of the Attorney General, 2007) available at [http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/CJRP-Report\\_EN.pdf](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/CJRP-Report_EN.pdf) (last visited Feb. 12, 2011).

<sup>35</sup> In Canada, the Office of the Auditor General is a government appointed independent administrative watch dog that reviews the government's performance annually and reports to the legislature on waste, impropriety and inefficiency within the public service. Each jurisdiction, provincial and federal, has an Auditor General. See e.g. Office of the Auditor General of Canada website, <http://www.oag-bvg.gc.ca> (last visited April 22, 2011).

<sup>36</sup> REPORT OF THE AUDITOR GENERAL OF PRINCE EDWARD ISLAND TO THE LEGISLATIVE ASSEMBLY: 2008, 70-91 (Charlottetown, 2008) available at: [http://www.assembly.pe.ca/auditorgeneral/ag\\_report2008.pdf](http://www.assembly.pe.ca/auditorgeneral/ag_report2008.pdf) (last visited April 22, 2011). Various studies have revealed default rates in the range of 30%. See, e.g., Kai Hildebrandt et al., *The Windsor Small Claims Court: An Empirical Study of Plaintiffs and their Attitudes*, 2 WINDSOR Y.B. ACCESS JUS. 87 (1982) (reporting 31%); Long, *supra* note 22, at 147 (reporting 35.3%); Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 MAINE L. REV. 237, 261 (1981) (reporting full compliance occurred in only 33.8% of adjudicated cases).

<sup>37</sup> *Ex facie* is defined as "from the face; apparently; evidently." Contempt of court is committed by a person who does any act in willful contravention of its authority or dignity, or tending to impede or frustrate the administration of justice, or by anyone who, being under the court's authority as a party to a proceeding therein, willfully disobeys its lawful orders or fails to comply with an undertaking which he has given. *Ex facie* contempt, also known as indirect or constructive contempt occurs outside the presence of the court. See Black's Law Dictionary, 2<sup>nd</sup> ed. 195, 335 (St. Paul, MN: West publishing Co., 1910).

<sup>38</sup> The notice of contempt hearing had to be served personally on the debtor. Rules of the Small Claims Court, O. Reg. 258/98 as amend., O. Reg. 295/99, Rule 20.10 (09)(10)(11) (Ont.).

<sup>39</sup> McGill *supra* note 19, at n. 194.

<sup>40</sup> The 1996 Civil Justice Review in Ontario concluded that: "The Small Claims Court is the only civil court where such a drastic remedy as a warrant of committal can be readily obtained. The current procedures dealing with these warrants lead to the perception that they are issued for non-payment of the judgment debt, as opposed to contempt of court for not appearing at a judgment debtor examination for non-payment. The Task Force is of the view that imprisonment for contempt in this context is inappropriate and recommends that less draconian options be considered."

In 2006, the Ontario process was changed, not only because of its alleged harshness, but over constitutional concern about the power of a deputy judge<sup>41</sup> to punish *ex facie* contempt.<sup>42</sup> The Ontario small claims adjudicator is a part-time deputy judge appointed from the ranks of the practicing bar for renewable terms of 3 years. An adjudicator lacks the inherent constitutional authority of a superior court judge and as a result has the authority to punish only *in facie* contempt.<sup>43</sup> The new process required the small claims contempt hearing to be held before a superior court judge. This seemingly minor adjustment had wide practical implications for both creditors and debtors. Superior courts are located in different courthouses and often different cities from their more widely accessible small claims court counterparts<sup>44</sup>. As well, superior court judges are rarely available to hear such proceedings, which typically rank far down their priority list. If the debtor appears for the contempt hearings, the superior court judge does not oversee the desired JD examination, as was the earlier practice of deputy judges, but rather orders a third appearance back in the small claims court for completion of the JD examination. If the debtor does not appear again, the process repeats. Not surprisingly, creditors found the process not worth their while and abandoned its use because of its circular nature.<sup>45</sup> Some middle ground needed to be found between draconian imprisonment and court orders without “teeth”.

Amendments proclaimed in force January 1, 2011,<sup>46</sup> return the control of the contempt hearing to the small claims court but with much reduced power to commit – a maximum of 5 days.<sup>47</sup> Still, returning control of the contempt hearing to the small claims court allows the JD

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MINISTRY OF THE ATTORNEY GENERAL, CIVIL JUSTICE REVIEW, 1996, EXECUTIVE SUMMARY, Part III, Enforcement (Toronto, 1996) available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/suppreport/exesummary.asp#Enforcement> (last visited Feb 12, 2011).

<sup>41</sup> A deputy judge is a lawyer called to the bar in Ontario appointed by the Regional Senior Justice and the Ontario Attorney General for renewable terms of three years to adjudicate small claims court trials on a part-time basis: Courts of Justice Act, R.S.O., 1990, c. C-43, §§. 24(2), 32(1).

<sup>42</sup> Rules of the Small Claims Court, O. Reg. 78/06 (amending O. Reg. 258/98 Rule 20.10(11) (Ont.).

<sup>43</sup> Deputy judges have the power to deal with contempt in court (in facie contempt) as opposed to contempt out of the court (ex facie contempt). Contempt in the face of the court takes place within the court or within the cognizance of the court: *see* Balogh v. St. Albans Crown Court [1975] 1 Q.B. 73 (U.K. C.A.). Every judge or magistrate has the same power and authority to preserve order in the courtroom: Criminal Code, R.S.C. 1985 c. C34, s. 484 (Can.); at common law it is the duty of the Superior Court to protect the integrity of inferior and statutory courts: *see* C.B.C v. Cordeau [1979] 2 S.C.R. 618, 638 (Can.) (ex facie contempt is the exclusive jurisdiction of the superior court); when it is argued that Small Claims Court is a branch of the Superior Court and therefore should have ex facie jurisdiction, the irregularities in the appointment process of a deputy judge are identified and *Cordeau* is again referred to: “A provincial legislature may not, without infringing s. 96 of the British North America Act, 1867, confer on a tribunal or a court the members of which are not appointed by the Governor General a jurisdiction which in 1867 was reserved to the superior courts.” *Id.* at 629; *Wickwire Holm v. Nova Scotia (Attorney General)* [2007] 285 D.L.R. 4th 439, 2007 NSSC 287, 45-48 (Can.) (dealing specifically with the small claims court context).

<sup>44</sup> For example, the superior court for the Waterloo Region is located in Kitchener, Ontario while the small claims court for Waterloo Region have two locations, one in Cambridge, Ontario, as well as Kitchener.

<sup>45</sup> McGill, *supra* note 19, at fn. 197 (citing usage statistics for Waterloo Region).

<sup>46</sup> Good Government Act, 2009, S.O. 2009, ch. 33, Sch. 2, § 20 (Ont.); O. Reg. 440/10, §§ 7(6), 9(2) (Ont.).

<sup>47</sup> On a practical level, it is unlikely that such a short stay warrant will reach the top of law enforcement priorities, as the weekend rules would allow a party to stay over one night and be released – unlikely to be considered worth the paper work involved for most police officers.

examination to be completed in conjunction with the contempt hearing if the debtor appears, eliminating the need for a subsequent appearance; a step in the right direction.

The Ontario post judgment enforcement process may also be less than satisfactory to debtors despite safeguards within the system limiting the harshness of the garnishment and seizure tools. All wage garnishments are subject to the limitation that the total amount garnished from any one debtor cannot exceed 20% of net wages.<sup>48</sup> As well, the court has authority to make a payment order following a JD examination. All the creditor's rights to garnish or seize may be suspended provided the debtor remains in compliance with the payment order.<sup>49</sup> The court may also consolidate multiple small claims court judgments under one combined payment order, thereby, providing some relief for a debtor subject to multiple creditor collection efforts.<sup>50</sup> The perceived weakness in the system lies in the courts inability to vary the outstanding balance owing to creditors or control the conduct of collection agencies communicating outside the court process. Some communications can be quite intimidating and possibly harassing but the court is powerless to address them. Consumer protection measures outside the small claims court process exist to address these concerns<sup>51</sup>. Bankruptcy legislation allows a consumer with debts of less than \$250,000 to file a proposal to reduce the indebtedness owed to creditors in exchange for voluntary orderly payment of the lesser amounts, all without going bankrupt.<sup>52</sup> With respect to harassing behavior of collection agents, the Ministry of Consumer Services has a complaints process available to consumers.<sup>53</sup> Although the Ministry receives thousands of complaints per year, critics complain of a serious under enforcement of debt collection laws, alleging that the Ministry is too easily satisfied by verbal assurances that the violation will not happen again.<sup>54</sup>

Why not also authorize the small claims court to address these concerns, in a form of one stop shopping for consumer debtors? The answer again lies in the limited jurisdiction of the court. The major constitutional barrier to expanding the small claims court debt consolidation and reduction power is that bankruptcy and insolvency are matters of federal jurisdiction and previous provincial initiatives have been found *ultra vires* of a province.<sup>55</sup> Controlling out of court collection agency behavior is also a lack of authority issue, as most small claims courts lack the power to grant equitable relief. Because injunctive, mandamus, or declaratory relief is

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<sup>48</sup> Wages Act, R.S.O. 1990, ch. W.1, § 7(2) (Ont.).

<sup>49</sup> Rules of the Small Claims Court, O. Reg. 258/98 as amend. Rule 20.10 (7)(8) (Ont.).

<sup>50</sup> *Id.*, Rules 20.09, 20.10 (1)-(7).

<sup>51</sup> In the Province of Ontario collection agencies are required to be licensed and anyone may file a complaint with the Registrar: Collection Agencies Act, R.S.O. 1990, c. C-14, §§ 12-16.2 (Ont.).

<sup>52</sup> Bankruptcy and Insolvency Act, R.S. 1985, ch. B-3, §§ 66.11-66.4 (consolidation), §§ 217-242 (consumer proposals) (Can.).

<sup>53</sup> Anyone can file a complaint online with the Registrar of the Collection Agencies Act: see Collection Agencies Act, R.S.O. 1990, ch. C.14, § 1(1) (Can.). In 2010, 5,041 complaints about collection agencies and debt collectors were received, the most of any industry and a five year high: Ministry of Consumer Services Website, [http://www.sse.gov.on.ca/mcs/en/Pages/Top\\_Ten\\_Complaints.aspx](http://www.sse.gov.on.ca/mcs/en/Pages/Top_Ten_Complaints.aspx) (last visited Feb. 12, 2011). Despite the high number of complaints only 8 collection agencies were recorded on the Ministry's Consumer Beware List as of December 2010.

<sup>54</sup> Jacob Ziegel, *Canadian Consumer Law and Policies 40 Years Later: A Mixed Report Card*, 50 CAN. BUS. L. J. 259, 287-90 (2010). See Courts of Justice Act, R.S.O. 1990, ch. C.43, §§ 23(1), 96(3) (Ont.).

<sup>55</sup> Re: Validity of Orderly Payment of Debts Act, 1959 (Alta.), [1956] S.C.R. 571 (Can.).

simply not available, orders are limited to the payment of money or the transfer of property.<sup>56</sup> These limitations often mean that the court cannot address struggling debtors concerns in any comprehensive way. Some, although not all, of these deficiencies in Ontario's scheme may be addressed by borrowing from U.S. enforcement models.

#### IV. INSIGHT FROM THE UNITED STATES

A matter of state and in some cases municipal regulation,<sup>57</sup> U.S. small claims courts also take varying approaches to structure and design.<sup>58</sup> However, there is uniformity on the relatively low monetary limits defining U.S. small claims. The Arizona limit is \$2,500, New York, Florida and Nevada all set limits of \$5,000, with California only slightly higher at \$7,500. These limits stand in stark contrast to their Canadian counterparts, where most provincial limits are \$20,000 or more. U.S. jurisdictions also seem very likely to segment certain types of claims into specialized forums to be heard separately such as housing, and commercial or business claims.<sup>59</sup> As in Canada, the standard seizure and garnishment tools are available to small claims court judgment creditors, and debtors receive protection from excessive wage garnishments.<sup>60</sup>

In the interests of brevity, it was deemed necessary to identify five key U.S. jurisdictions which offer insight into effective judgment collection. New York was chosen because of its high and dense urban population – assuming this would translate into high usage and therefore a well-developed collection system. Indeed, New York City is the busiest small claims court in the U.S., averaging 600,000 claims annually since 2006.<sup>61</sup> Four other states, Florida, Nevada, Arizona and California, were chosen because they are the states that were most devastated by the recent real estate correction.<sup>62</sup> It was thought that this real estate crisis, which translated into a general economic down turn, would lead to more delinquent accounts of all types, and as a result, well developed civil court or debt collection systems, even at the small claims level. Each of the aforementioned state's enforcement systems was examined to identify novel approaches, not present in any of the existing Canadian models. As is common in Canada, all five sample U.S.

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<sup>56</sup> See e.g., *Grover v. Hodgins*, 2011 ONCA 72 49 (Ont.) (finding that the Ontario Small Claims Court power to grant equitable relief is limited to the payment of money or transfer of property within the jurisdiction of the court).

<sup>57</sup> As an example of how some municipalities have their own peculiar rules, see N. Y. CITY CIV. CT. ACT § 18 (McKinney 2011).

<sup>58</sup> See generally, Josephine Y. King, *Small Claims Practice in the United States*, 52 ST. JOHN'S L. REV. 42 (1977-1978) (discussing the development of the United States Small Claims Court).

<sup>59</sup> N.Y. CITY. CIV. CT. ACT, § 1801 (small claims), § 1801.A (commercial claims), § 1.110 (housing part) (McKinney 2011).

<sup>60</sup> Consumer Credit Protection Act, Title III, 15 U.S.C. 1671 §§ 301 – 307 (garnishments may not exceed 25% of net wages).

<sup>61</sup> New York City Unified Court System Website – Small Claims Part

<http://www.nycourts.gov/courts/nyc/smallclaims/civilhistory.shtml> (last visited Oct. 31, 2010). Term by term statistics available at <http://www.nycourts.gov/courts/nyc/smallclaims/statistics.shtml> (last visited Oct. 31, 2010).

<sup>62</sup> Beginning in 2007 RealtyTrac foreclosure market reports repeatedly show Florida, Arizona, Nevada and California as the states with the most foreclosures. The twenty metropolitan areas posting the highest number of foreclosures are all from Florida, California, Nevada and Arizona: <http://www.realtytrac.com/content/foreclosure-market-report/> (last visited Sept. 30, 2010).

jurisdictions place some of the burden of collection on the judgment creditor; however, there are different court initiated supports available to American debtors and creditors which do not exist in Canada.

A. *New York*

New York State has a uniform civil court process subject to specific modifications for the New York City small claims court. It offers three unique small claims court features worthy of consideration for adoption in other jurisdictions. First, private enforcement officers are available for use by creditors; second, debtor financial information may be subpoenaed from third parties; and third, the court has the power to punish delinquent business debtors with treble damages.<sup>63</sup>

New York offers publicly employed enforcement officers for use by creditors to pursue the standard collection remedies on a fee or commission basis. Still, it is the creditor's responsibility to first locate the assets. This is done by way of an information subpoena issued by the court at the creditor's request, and cost, to gather information regarding the debtor's assets. The extraordinary aspect of this subpoena is that it may be served not only on the judgment debtor but also on *any person, corporation or business that the creditor believes has information about the debtor's financial circumstances*.<sup>64</sup> This is an extremely wide search power for a creditor and relevant information must be supplied at no cost to the creditor. Presumably, any bank served would have to disclose the account information related to the debtor. This is a much broader information gathering tool than is currently available in any Canadian jurisdiction.

New York's broad power to search for information could be abused through indiscriminate use of information subpoenas as a form of "fishing expedition." To discourage this practice, the rules require that prior to the service of a subpoena, the creditor must have a reasonable belief that a person, other than the judgment debtor, has information about the debtor that will assist the collection of the judgment. Still, the reason for the belief need not be disclosed and the burden is on the subpoenaed party to challenge its existence. The subpoenaed party need not hold assets themselves, but simply have knowledge about the source and whereabouts of the debtor's assets. Nor does there seem to be a requirement that only banks or businesses be served, so personal relationships could also be the source of information the creditor seeks to find.

Privacy concerns abound with such a broad court power to compel disclosure of debtor personal information. Noticeably absent were any safeguards for the use, storage protection and destruction of any personal or financial information provided to a creditor. Prior notice to the affected party is a common privacy protection afforded to Canadians,<sup>65</sup> however, in this context, such a requirement would obviously defeat the effectiveness of the subpoena as the debtor could quickly move any identified assets.

In terms of encouraging debtor participation, written response to the subpoena eases the burden of attending before the court but the obligation to respond is treated no less seriously.

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<sup>63</sup> For the most part, the remarks contained herein apply to the New York City court since it was this high volume jurisdiction that triggered the interest in the state.

<sup>64</sup> N.Y. C.P.L.R. § 5224 (McKinney 2011); N.Y. CITY CIV. CT. ACT, § 1812(d) (McKinney 2011).

<sup>65</sup> Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5 (Can.) (PIPEDA) (controls the collection, use and disclosure of personal information by organizations).

In sharp contrast to Canadian jurisdictions, the court is expressly given the same power to punish for contempt arising from the information subpoena as has the New York Supreme Court.<sup>66</sup> Both a failure to respond or provide accurate information qualify as contempt, triggering the power to summons an uncooperative person before the court and possibly commit a debtor to jail.<sup>67</sup> This is an extreme penalty for a non-debtor only alleged to have information about the debtor's finances.

The New York court also has the power to monetarily punish a defendant business that does not pay its outstanding judgments. The court maintains an index of unsatisfied judgments<sup>68</sup> and business debtors who have three or more on the list may be sued by unsatisfied judgment creditors for triple the damages.<sup>69</sup> To defend, the business must establish that it has insufficient resources to pay the outstanding judgments. This provides an alternate way for the creditor to obtain the necessary financial disclosure. Finally, the opportunity to continue in a licensed business activity is threatened by unsatisfied judgments, as the court must advise the local or state licensing authority of any defaults or treble award.<sup>70</sup> The licensing authority may consider any deliberate failure to pay or pattern of no payment as the basis for revocation or suspension of the business license. This is a very unique tool not presently available in Canada. Moreover, the reporting responsibility is assigned to the court not the creditor.

Since corporations or partnerships are not allowed to be plaintiffs in the general New York small claims court,<sup>71</sup> these above described remedies are naturally weighted in favor of the individual plaintiff suing the business defendant. Businesses must take their claims against customers to the commercial part of the court where the collection remedies are only slightly different. One would have expected that debtor relief and accommodation would be a higher priority in that forum. The same alphabetical list of unsatisfied debts is maintained in the commercial small claims court and a debtor has the power to have their name removed from the list.<sup>72</sup> As well, the treble damage penalty and license revocation are still reserved for only business defendants. Somewhat surprisingly, there are no other special debt relief accommodations available to individual debtors experiencing hardship. In sum, New York offers a different perspective on judgment collection with heavy emphasis on improved collection from business debtors through the imposition of sanctions. However, less insight is offered on possible debtor accommodation initiatives.

#### *B. Florida*

Florida small claims courts acknowledge the difficulty with collection upfront, with a warning on the court's self-help website stating that the "court cannot collect money damages for

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<sup>66</sup> N. Y. CITY CIV. CT. ACT § 1812(d) (McKinney 2011) (a sharp contrast to the Ontario court's contempt power, *supra* notes 37-47 and accompanying text).

<sup>67</sup> N.Y.C.P.L.R. §§ 5224, 2308(b) (McKinney 2011).

<sup>68</sup> N.Y. CITY CIV. CT. ACT § 1811(d) (McKinney 2011).

<sup>69</sup> *Id.*, § 1812(b).

<sup>70</sup> *Id.*, §§ 1812(c), 1813(b).

<sup>71</sup> *Id.*, §§ 1809, 1809-A (limiting the number of commercial claims that may be started to five per month and prohibiting collections agencies from taking assignments).

<sup>72</sup> N.Y. CITY CIV. CT. ACT § 1811.A (McKinney 2011).

you. You may wish to consult with an attorney for advice on how to collect a judgment.”<sup>73</sup> This is an alarming abdication and acknowledgment from a court that is supposed to be user friendly and easy to access. Still, Florida adopts a novel approach to information gathering – early intervention. Florida’s practice of incorporating information gathering and debtor accommodation features into the judgment granting process is worthy of consideration in other jurisdictions.

In Florida, debtor financial information may be collected at the point of granting judgment rather than waiting to subsequently access post-judgment processes. When the judgment is about to be entered, a creditor may request or the court may, on its own initiative, inquire into the financial condition of the “soon-to-be” debtor.<sup>74</sup> Creditors may learn valuable information about employment and banking details at this very early stage. If the court is so inclined, it may impose an arrangement to pay on the parties and it may further accommodate the debtor’s circumstances by staying entry or execution of the judgment. These initiatives support both creditors in the search for assets, and debtors in relief from arbitrary collection. The extra steps of issuing and serving a notice or subpoena after judgment and waiting for information to be returned are avoided. Instead, the Florida scheme gives creditors early insight into the location of debtor’s assets, thus saving valuable time as collection can begin immediately.<sup>75</sup> Importantly for the debtor, relief does not depend upon debtor awareness; the court may invoke the process or initiate a stay on its own motion and need not wait for a request for accommodation from the debtor. Debtors and creditors may leave the trial with a full resolution in hand – the outcome on the merits and the plan for collection in place – providing valuable peace of mind for both parties.<sup>76</sup>

Early intervention is also applied to default proceedings, when the debtor is not present. At the creditors request the court can include the demand for information in the judgment and set the time limit for return of the financial disclosure form.<sup>77</sup> The debtor gets notice as part of the judgment and again the post-judgment steps of separately issuing and serving information subpoenas are bypassed. Although it may be less likely that an absentee party will return the demanded information, it moves the process more quickly to contempt proceedings when the initial demand is contained in the judgment.<sup>78</sup> The contempt powers available in the Florida small claims court include commitment to jail and the court attempts to make the fine line distinction that incarceration is for failure to return the information sheet and not for non-payment.<sup>79</sup> One wonders whether the debtor recognizes the distinction.

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<sup>73</sup> Florida State Courts Website, Self Help - Small Claims: [http://www.flcourts.org/gen\\_public/family/self\\_help/smallclaims.shtml](http://www.flcourts.org/gen_public/family/self_help/smallclaims.shtml) (last visited Oct. 31, 2010). This is also a recommendation of the Colorado small claims court. See Best et al. *supra* note 11, at 365, n. 115.

<sup>74</sup> FLA. SM. CL. R. § 7.210 (LexisNexis 2011).

<sup>75</sup> Florida rules normally require executions to wait until the time to set aside a judgment has passed – FLA. SM. CL. R. § 7.200 (LexisNexis 2011).

<sup>76</sup> Long, *supra* note 22 (desire to end the dispute and perception of fairness are both factors contributing to voluntary compliance with judgments).

<sup>77</sup> FLA. SM. CL. R. 7.221(a) (LexisNexis 2011) (requiring completion of Form 7.343).

<sup>78</sup> FLA. SM. CL. R. Form 1.982 (LexisNexis 2011) (contempt notice); the court has all the same remedies as are generally available in the higher courts – FLA. SM. CL. R. § 7.220 (LexisNexis 2011).

<sup>79</sup> See, e.g., Sarasota County Court Clerk Website, <http://sarasotaclerk.com/default.asp?Page=70> (last visited Oct. 4, 2010). Courts often make this distinction when dealing with expert witnesses who fail to turnover financial information in response to voir dire questions aimed at their income for bias purposes.

Finally, creditors are required to file a satisfaction of judgment form with the clerk once they have been paid in full. This is an important debtor protection component ensuring that completed obligations are removed and do not continue to plague a debtors reputation long after they are satisfied. This final step is missing in many Canadian jurisdictions and is one of the recommended reforms added to the P.E.I. and Nova Scotia systems.<sup>80</sup> Continued court management of the file throughout collection will protect both debtor and creditor. Canadian jurisdictions can learn from Florida's continuous presence through early intervention and concluding requirements.

### C. *Arizona*

Arizona's small claims court rules of procedure are quite sparse providing only limited assistance to debtors and creditors as they navigate through the post-judgment process. Standard collection tools are available to Arizona small claims judgment creditors including replevin, execution (money or goods), and levy against real property.<sup>81</sup> Arizona also adopts an early intervention approach similar to that of Florida by empowering the court to hold a judgment debtor examination at the time of awarding judgment either at the creditors request or on the courts own initiative.<sup>82</sup> However, there is no power to examine anyone other than the debtor, general rules of civil procedure would allow third party examinations but this creditor right is not extended to small claims court judgments.<sup>83</sup> Nor is there power to impose periodic payments, stay the judgment, or suspend the collection rights of the creditor. Arizona's rules lack any debtor relief components whatsoever. Contempt powers are also missing from the small claims court process and it is doubtful that theses could be borrowed from the higher court rules.<sup>84</sup> There is no general saving provision that allows all procedural gaps to be filled by analogy to the higher court rules, as is the case in some Canadian jurisdictions such as Ontario, and in Nevada, as discussed below. Little new insight is gained from examination of Arizona's model.

### D. *Nevada*

Nevada's small claims court rules are also few in number. A total of just thirteen rules govern the pre- and post-judgment procedures, including the standard forms.<sup>85</sup> However the result is quite different from that in Arizona because of one additional provision – a general saving provision that allows all procedural gaps to be filled by analogy to the higher court rules. This remedial measure is worthy of adoption in all jurisdictions.

Nevada's small claims court adjudicators are empowered to deal with recovery of money only and this may be done through post-judgment attachment of assets or garnishment of

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<sup>80</sup> *Auditor General of Prince Edward Island, supra* note 36, at 84; Patry, *supra* note 11, at 94.

<sup>81</sup> ARIZ. REV. STAT. § 22.520 (LexisNexis 2011) (incorporating §§. 22.243-22.246).

<sup>82</sup> ARIZ. REV. STAT. § 22-524 (LexisNexis 2011).

<sup>83</sup> ARIZ. REV. STAT. §§ 12-1570, 12-1634 (LexisNexis 2011).

<sup>84</sup> It is likely that the express adoption of collection rights contained in ARIZ. REV. STAT. §§ 22-243-22.246 (LexisNexis 2011) would be interpreted as thereby excluding rights and powers in the other sections not expressly incorporates such as contempt powers of the higher court found in §§ 12-1500 et seq.

<sup>85</sup> JCRCP ch. XII, Rules 88 – 100. Creation of the Court is regulated by NEV. REV. STAT. §§ 73.010–73.060 (2010) (8 sections in total).

monies owed.<sup>86</sup> There is power to impose payment conditions (i.e. periodic payments or suspend creditor rights) at the time of awarding judgment. Although not expressly described in the rule, it would be logical that terms would only be imposed after an inquiry into the financial circumstances of the judgment debtor.<sup>87</sup> Finally, one relatively unusual process designed to ensure compliance not present in Canadian models is to require that a bond to guarantee of payment of the judgment be filed if the matter is appealed. This proactive court driven imitative ensures that appeals are not used by insincere debtors merely as a delay tactic but has harsh repercussions for the impoverished litigant.

Nevada's short list of provisions is expanded exponentially by the saving provision that incorporates the collection procedures applicable to Nevada's higher courts (not in conflict with the express small claims court rules) into the small claims court process in order to make it "complete and effective."<sup>88</sup> As a result the powers of the Nevada small claims court also include broad power to ensure co-operation of a judgment debtor at an examination by arrest or surety bond,<sup>89</sup> by examination of debtors' of the judgment debtor,<sup>90</sup> by summoning witnesses,<sup>91</sup> by transferring property,<sup>92</sup> and by punishing non-compliance with contempt.<sup>93</sup> Naturally, the incorporation of higher court procedures tend to favor and expand only creditor rights as the focus of the higher court is not on user friendly processes or consumer protection. The small claims court would traditionally be expected to have more accommodating debtor relief processes than that of its higher counterpart. Still, a qualifying statement limiting the incorporation of higher court procedures to only those that are not in express or implied conflict with the words and spirit of the small claims court rules could fill gaps *and* protect debtor friendly initiatives.

As in Ontario, the Nevada contempt procedures are divided into *ex facia* and *in facia* processes. *In facia* contempt may be punished summarily by the adjudicator in whose court it occurred, while *ex facia* contempt must be scheduled before a different judge than the one whose order is violated.<sup>94</sup> This difference seems to focus on objectivity not the relative status of the adjudicators of inferior courts, as justices of the peace<sup>95</sup> are given the express authority to punish for contempt in the same manner as a judge.<sup>96</sup> The punishment may be a \$500 fine and or up to 25 days in jail.<sup>97</sup> Importantly, Nevada and, as will be discussed below, California small claims courts retain full authority over their own contempt proceedings.

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<sup>86</sup> NEV. REV. STAT. §§ 73.010, 73.020 (2010) (recovery of money not exceeding \$5000 and no pre-judgment attachment or garnishment).

<sup>87</sup> JCRCP ch. XII, R. 97.

<sup>88</sup> NEV. REV. STAT. § 72.060 (2010); Ontario does have a similar provision but its detailed rules about contempt exclude any general assistance in the area of contempt.

<sup>89</sup> NEV. REV. STAT. § 21.280 (2010).

<sup>90</sup> NEV. REV. STAT. § 21.300 (2010).

<sup>91</sup> NEV. REV. STAT. § 21.310 (2010).

<sup>92</sup> NEV. REV. STAT. § 21.320 (2010).

<sup>93</sup> NEV. REV. STAT. § 21.340 (2010) (contemplates the power being exercised by a master as well as a judge which would seem to indicate Nevada does not divide the power to punish for contempt based on the status of the adjudicator as has been the problem in Ontario).

<sup>94</sup> NEV. REV. STAT. § 22.030 (2010).

<sup>95</sup> Justices of the peace preside over Nevada Small Claims Court – NEV. REV. STAT. § 73.010 (2010).

<sup>96</sup> NEV. REV. STAT. § 74.040 (2010).

<sup>97</sup> NEV. REV. STAT. § 22.100 (2010).

E. *California*

The California small claims court enforcement process is a mirror image of the higher court model except for three key modifications worthy of consideration for use in other jurisdictions. First, judgment triggers mandatory filing of written financial disclosure by the debtor. Second, only original creditors, not assignees of the debt i.e. professional debtor collectors, may access to the collection process. Finally, responsible creditor behavior is encouraged with the creation of a civil cause of action for debtors damaged by wrongful creditor behavior.

Enforcement of a California small claims court judgment cannot commence until after the expiration of the appeal period and continues for only 10 years unless the judgment is renewed.<sup>98</sup> During this period, small claims creditors may proceed to garnish money, attach personal property, and levy against real property, in the same manner as their superior court counterparts. As in Nevada, the higher court rights are expressly incorporated into California small claims court procedure.<sup>99</sup> Judgment debtors may be examined to identify assets, as may debtors of the judgment debtor, and failure to appear could trigger an arrest warrant.<sup>100</sup> No separate contempt hearing is required prior to the issue of this warrant provided proof of service is proffered.

California small claims court judgment debtors are required to complete a financial information form<sup>101</sup> within 30 days of the entry of the judgment and provide that information to the judgment creditor. Any *willful* failure to do so may be considered contempt of court and attract punishment including arrest.<sup>102</sup> This power to determine and punish for what would be considered *ex facie* contempt is expressly given to the small claims court and not imported by analogy. The California court's authority to adjudicate and punish for contempt is more clearly defined than most of the other five U.S. jurisdictions examined.

California debtor relief provisions allow the judgment to be paid in installments, directly into the court and without the accrual of post judgment interest during the progress payments.<sup>103</sup> In addition, this procedure offers some unique protection for debtors whose credit report may be plagued by judgments long ago satisfied or may be subject to damaging behavior from collection agencies. In addition to requiring a creditor to file a satisfaction of judgment as some other states do, California creditors are exposed to liability for failure to do so.<sup>104</sup> A debtor may sue a creditor for damages arising from the creditor's failure to advise the court that the judgment has been paid and may themselves apply to note the judgment as satisfied.<sup>105</sup> This is an idea worthy of consideration by other jurisdictions and could be applied more broadly to bring

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<sup>98</sup> CAL. CIV. PROC. CODE § 116.810 (Deering 2010) (this protection of the debtor during the appeal period is in sharp contrast to Nevada's appeal requirement that monies be paid into court).

<sup>99</sup> CAL. CIV. PROC. CODE § 116.820, §§ 695.010 et seq., §§ 706.010 et seq. (Deering 2010).

<sup>100</sup> CAL. CIV. PROC. CODE § 708.110 et seq., § 708.170 (Deering 2010) (incorporated into the small claims procedure by §116.830(d)). A somewhat narrower reach than in New York where anyone with knowledge may be examined.

<sup>101</sup> Judgment Debtor's Statement of Assets Form – S.C. 133: CAL. CIV. PROC. CODE §§ 116.620a, 116.830 (Deering 2010). It seems information may be collected but not acted upon during the appeal period.

<sup>102</sup> CAL. CIV. PROC. CODE § 116.830(d) (Deering 2010).

<sup>103</sup> CAL. CIV. PROC. CODE § 116.820 (Deering 2010). Post judgment interest runs at the rather surprisingly high rate of 10% per annum, as compared to current lending rates.

<sup>104</sup> CAL. CIV. PROC. CODE § 116.850 (a), (c) (Deering 2010) (14 day time period).

<sup>105</sup> CAL. CIV. PROC. CODE § 116.850 (c), (d) (Deering 2010).

a more thoughtful approach to post-judgment behavior of creditors generally. Possibly as a means of limiting or at least casting light on the activity of collection agencies, California prohibits the participation of assignees of the judgment debt in the post judgment collection process unless they have officially become the judgment creditor of record.<sup>106</sup> Both of these measures offer unique debtor relief from less obvious challenges beyond inability to pay. In sum, California offers extended compliance enforcement through superior court-like contempt powers and a broad approach to debtor relief reflected in the tackling of less obvious debtor concerns.

## V. BORROWING FROM A NEIGHBOR

For Canadian legislators, there are lessons that can be learned from the U.S. jurisdictions discussed herein and Canada can also offer some reciprocal insight for its southern neighbors. Traditional small claims court priorities of speedy, low cost, simple, and user friendly processes are evident in the various features of U.S. post-judgment enforcement models. Though the characteristics of specific features vary, several notable re-occurring themes are present. The first theme is early intervention. The U.S. models tend to address debtor information gathering and debtor accommodation (if any) much earlier in the process than Canadian jurisdictions do. Second, many steps within U.S. enforcement processes are court rather than user driven. Mandatory filing of written debtor financial information is automatic in many of the U.S. jurisdictions. As well, U.S. courts are generally empowered to act on their own initiative in the enforcement process. This is in sharp contrast to the almost entirely user driven reactive procedures available in Canada. Finally, measures protecting the integrity of the system are present in all the U.S. models examined. Examples include measures related to the availability of compliance information, the accuracy of information and contempt proceedings. Each of these themes, early intervention, court driven processes, and protection of the integrity of the system, adds fairness to the process by easing barriers to use for both creditors and debtors. All three themes should be incorporated into Canadian models.

Canadian models offer some features worthy of consideration for adoption in the United States. Debtor accommodation measures were generally less prominent in the U.S. models than in Canada, and noticeably missing was the ability to collectively manage multiple judgments or protect privacy of debtor financial information. U.S. models seemed more willing to simply mirror the harsh creditor rights of the higher courts rather than customize debtor friendly compromises.<sup>107</sup> Canadian models can provide U.S. jurisdictions with some insight on debtor accommodation, as well as benefit from the adoption of U.S. measures promoting early intervention, court driven initiative, and integrity of the system.

### A. *Early Intervention*

The collection of debtor financial information at the conclusion of the trial, without a subsequent attendance (and therefore separate service), represents the most common form of early

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<sup>106</sup> CAL. CIV. PROC. CODE § 681.020 (Deering 2010).

<sup>107</sup> This is a long standing complaint: *See* Elwell & Carlson, *supra* note 11, at 450.

intervention found in almost all of the U.S. models examined.<sup>108</sup> Also very common is the collection of data by way of written submission (rather than attendance), demand for which is issued at trial, sometimes in the judgment itself.<sup>109</sup> Neither information gathering tool requires prior unsuccessful attempts at collection.<sup>110</sup> None of the U.S. models go so far as to require pre-judgment financial disclosure as was the recommendation of the Nova Scotia Small Claims Court Evaluation.<sup>111</sup> Less common is the debtor accommodation measure of imposing an arrangement to pay and/or suspension of creditor remedies immediately after trial. With some modification and blending of these two measures, the access to justice capabilities of the both the Canadian and U.S. post-judgment processes can be improved.

Early intervention measures primarily target barrier reduction and promote the access features of the court. The removal of steps in the process simplifies the system, reduces cost, eliminates additional service requirements, and moves the process more quickly towards ultimate resolution (satisfaction of the judgment). All these benefits are expressed goals of the small claims court's quick, easy, and inexpensive process. Both debtor and creditor benefit from fewer court attendances and the resulting reduced costs. Expenses related to absence from work, transportation, and preparation or representation time are reduced if not avoided by fewer attendances. Although costs are initially paid by the creditor, in Canada they are ultimately born by the unsuccessful party and, therefore, expense reduction benefits both parties. Certainly, the judgment creditor will see the system as user friendly if the proceedings move automatically from judgment to information gathering without the need for creditor action.

If there are concerns about early intervention, they arise from the justice or fairness components of the access to justice principle. Is it fair to ask a litigant to disclose his private financial information before the judgment is even entered, the decision to appeal is made, or default has occurred? Will the financial disclosure be complete if a surprise result finds an unexpected judgment debtor ill prepared to answer financial questions? What safeguards are necessary to insure the privacy and security of information provided? What will be the consequences if the process moves too fast for a debtor trying to come to terms with his or her financial reality? These are just some of the fairness issues presented by early intervention. However, as with many fairness concerns, a carefully designed procedure can alleviate many substantive obstacles and therefore it is recommended that the U.S. early intervention approach be adopted in Canadian jurisdictions.

The combined use of early intervention at trial and written financial disclosure could support both user friendly access and procedural fairness. An ideal model would see the court provide *both* parties with financial disclosure forms prior to trial; parties would complete the form and bring it to trial. Forms would be retained in the owner's possession until the conclusion of the trial. At the point of judgment, the party who becomes the debtor would submit his or her form to the court for examination by the court and the creditor. Privacy concerns about the disclosure of information are reduced as submission is written, not oral, and provided to the court, not the creditor. The disclosure would be more complete and accurate as it was not extracted at the stressful point of judgment, but compiled over time at the convenience of the debtor.

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<sup>108</sup> Florida, Arizona, California, Nevada – the exception is New York.

<sup>109</sup> New York, California; Florida makes demand for information in judgment itself.

<sup>110</sup> In contrast to the Ontario judgment debtor examination which must be initiated by the creditor and only after default has occurred: O. Reg. 258/98 as amend., R. 20.10(1) (Ont.).

<sup>111</sup> Patry, *supra* note 11, at 92.

The fairness and justice considerations of both parties could be advanced if a creditor's right to receive early financial information was balanced with early consideration and accommodation of a debtor's circumstances through an arrangement to pay. As will be discussed more fully below, the court should be empowered to consider the debtor's financial circumstances, impose an arrangement to pay, and suspend or vary creditor remedies if appropriate. The advance preparation of the financial disclosure form could also serve to prepare the debtor for discussion of an appropriate arrangement to pay. Protocols involving closed hearings and safekeeping of the disclosure form would need to be in place so that the general public was not privy to the dialogue. Rather than simply turning the disclosure form over to the creditor, as is the practice in California, the court should be the custodian of the document and impose penalties for false information as in New York.<sup>112</sup> With balanced measures early intervention strategies can improve both access and justice features of the court for both creditors and debtors.

*B. Court Driven Initiatives Encouraging Compliance and Preventing Default*

Some of the U.S. models contain court driven procedures that do not require action from a creditor or debtor. Canada could learn from this shift away from the user driven model that burdens the creditor with the entire responsibility for moving the process forward and limits a debtor's ability to receive accommodation. Fundamental to improving access and reducing barriers to use is the court assuming more of the responsibility currently born by the litigants.

Three key components of the procedure recommended above should be triggered by the court rather than a creditor or debtor. First, the written financial disclosure form should be sent by the court to both parties as part of the notice of trial with a warning that it must be completed truthfully (under oath) and brought with the litigant to the trial. Failure to do so would attract penalties including the inability to participate at trial. The court should ascertain that the form is complete prior to commencement of the trial and administer an oath, if necessary. Even undefended actions, where defendants may not receive a notice of trial, can incorporate a court initiated demand for information by including the request in the default judgment and setting a time limit for compliance, as is the case in California.<sup>113</sup> The court initiative is a departure from the New York process in which the creditor must request the issuing of an information subpoena.<sup>114</sup> However, both New York and California punish willful failure to complete the disclosure form.<sup>115</sup> The court could track the return of the form and automatically commence contempt proceedings at the expiration of the time limit. It will be clear to a debtor that compliance is important if the demand comes from the court, the form is returned to the court, and default is punished by the court on its own initiative.

Second, the court should take the initiative to begin the examination of financial information at the conclusion of trial without a prior creditor request and should retain the completed form. Virtually all of the U.S. models empower the court to initiate examination of the debtor on his or her own. The obligation to provide information will be seen as owed to the court and not the creditor. Third, the trial court should be able, *sua sponte*, to consider the appropriateness of an accommodation

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<sup>112</sup> *Supra* note 67, and accompanying text.

<sup>113</sup> *Supra* notes 101, 102, and accompanying text.

<sup>114</sup> *Supra* note 64, and accompanying text.

<sup>115</sup> *Supra* notes 67, 102, and accompanying text.

for the debtor in the form of an arrangement to pay, a stay of the judgment, or suspension of creditor rights without the debtor requesting the same.<sup>116</sup> As a natural justice protection, accommodation should not depend upon a debtor's awareness of its availability but rather on demonstrated need which the form could show and the court could assess.<sup>117</sup> Both Nevada and California give their small claims courts this inherent responsibility.<sup>118</sup>

Canadian small claims courts should also adopt the New York practice of maintaining a record of unsatisfied judgments - searchable by debtor or creditor name. Litigants should be advised that this record is a public one, searchable by litigants and non-litigants alike. Debtors could use the data bank to ensure that satisfied obligations are removed and to obtain proof of same for other lenders and creditors. Potential plaintiffs would be able to determine in advance the likelihood of collecting from a proposed defendant by determining how many other judgments are outstanding. Useless litigation and expense will be avoided and the court will be seen as forewarning the creditor. Proceed at your own risk. PEI began tracking unsatisfied judgments in 2009 after the Auditor General complained about inadequacies in the system.<sup>119</sup>

However, Canadian jurisdictions may not wish to adopt some of the more draconian measures in force in U.S. small claims courts. For example, New York makes use of its list -to identify those business debtors that should be liable for treble damages as a result of default. More will be said about this practice below, however it seems extreme and another one of New York's measures could be equally effective, if not more so, in encouraging compliance from debtors deliberately defying a court order. As noted earlier, New York courts are required to report delinquent judgments to the business's licensing authority. The regulatory licensing body or professional governing associations are then required to consider the information as relevant to revocation or suspension of the business license. This measure threatens the very livelihood of the business and seems far more likely to gain attention than yet another payment order similar to those already being ignored. The court's reporting obligation does not depend upon creditor action. Obviously, the measure will have varying effect depending upon the nature of the business and the power of the governing body but it presents a unique court driven approach to collection.

On the preventative side, two U.S. state measures are worthy of consideration. California takes a proactive approach to debtor accommodation by automatically suspending all creditor collection rights until expiration of the appeal period.<sup>120</sup> Although the small claims court rules are silent, by analogy it would appear that if an appeal is filed, the suspension continues. This gives the debtor time to consider his or her position but also stale dates the financial information provided at trial which may allow an unscrupulous debtor to dispose of assets. A more balanced approach which Canadian jurisdiction may wish to employ would be to prohibit the court from disbursing

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<sup>116</sup> O. Reg. 258/98 as amend., R. 20.02 (Ont.) (empowering the court to stay enforcement or vary terms of payment but this rule does not obligate the court to consider these possibilities nor is it times with the entry of the judgment).

<sup>117</sup> Precedent already exists in Ontario for financial criteria to assess financial need when considering litigants eligibility for fee waivers. See O. Reg. 2/05 as amend. O.Reg. 671/05 (Ont.).

<sup>118</sup> *Supra* note 87, and accompanying text; CAL. CIV. PROC. CODE § 116.620(a) (Deering 2010).

<sup>119</sup> *Supra* note 36, and accompanying text. See also REPORT OF THE AUDITOR GENERAL OF PRINCE EDWARD ISLAND TO THE LEGISLATIVE ASSEMBLY: 2009, 173-74 (Charlottetown, 2009) available at: [http://www.gov.pe.ca/photos/original/ag\\_report2009.pdf](http://www.gov.pe.ca/photos/original/ag_report2009.pdf) (last visited April 22, 2011).

<sup>120</sup> CAL. CIV. PROC. CODE § 116.620(a) (Deering 2010). As well only debtors are allowed to appeal, not plaintiffs (subject to limited rights to vacate, See CAL. CIV. PROC. CODE § 116.710(a) (Deering 2010)).

funds collected during the appeal period until after its expiration or conclusion of any appeal. Debtors wanting to limit the activity of creditors could pay the money into court voluntarily, knowing it would be returned to them in the event of a successful appeal. This is a somewhat more debtor friendly position than the Nevada requirement that a bond must be filed in order to process an appeal.<sup>121</sup> Nevada's bond requirement is not recommended for Canadian jurisdictions as the effect is to restrict appeal rights based upon financial grounds. Denying impecunious defendants access to appeals violates the fairness component of access to justice, as one hallmark of a just adjudicative process is the ability to correct its own mistakes.<sup>122</sup> Unsuccessful litigants should not be barred from appeal based upon financial condition. In sum, both creditors and debtors will benefit from a more court controlled system that initiates early information gathering, debtor accommodation, tracking of compliance, and disbursement of funds rather than only responding to such matters in a user driven format.

### C. Integrity of the System

The third theme prevalent in the U.S. models involves insuring that the small claims court system is trusted, reliable, and effective, also hallmarks of a just adjudicative process.<sup>123</sup> Principles of fairness require that parties not be allowed to undermine or manipulate the system through flagrant disobedience, deception, and dishonesty<sup>124</sup>. Checks and balances must be in place to support the integrity of the process. If the small claims court is perceived as ineffective, weak or a waste of time, the entire administration of justice will be brought into disrepute. Most people's only experience with a civil court will be in the small claims court and this experience will shape their perception of the entire system.<sup>125</sup>

In the post-judgment context, the effectiveness of the system depends upon accurate debtor financial information being available to the creditor. If the debtor does not satisfy the judgment voluntarily, a creditor needs accurate information to locate assets on his or her own. In the U.S. models, the debtor's information is retrieved not only from the debtor but also from third parties. As noted above, New York's search involves the widest group, allowing creditors to obtain information from any person believed to have information about the debtor.<sup>126</sup> Most

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<sup>121</sup> JCRCP ch. XII, Rules 98, 100. Upon the filing of the bond enforcement of the judgment is stayed. Contrary to California both plaintiffs and defendants may appeal.

<sup>122</sup> Perceptions of fairness are influenced by the substance of the outcome and the process by which it was derived – factors include consistency, neutrality, accuracy, transparency and appeal ability: Patry, *supra* note 11, at 15; Long, *supra* note 22, at 150 (also finding litigants found outcomes fair if result achieved was better than opponent).

<sup>123</sup> Patry, *supra* note 11, at 15 (summarizing procedural justice requirements of a fair dispute resolution process articulated by Gerald .S. Leventhal, *What Should Be Done with Equity Theory? New Approaches to the Study of Fairness in Social Relationships*, in SOCIAL EXCHANGE 27-55, (Kenneth J. Gergen et al eds., 1980).

<sup>124</sup> ASSOCIATION OF CANADIAN COURT ADMINISTRATORS, DEVELOPMENT OF PERFORMANCE STANDARDS IN CIVIL JUSTICE: A DISCUSSION PAPER, 5-9 (2006), <http://cfjc-fcjc.org/docs/2006/acca-en.pdf> (last visited April 22, 2011); See also Roderick A. Macdonald, *Access to Justice in Canada Today: Scope, Scale and Ambitions*, in ACCESS TO JUSTICE FOR A NEW CENTURY: THE WAY FORWARD, 19 (Julia Bass et al., eds., 2005).

<sup>125</sup> McGill, *supra* note 19, at 213-14, n. 2, 3.

<sup>126</sup> *Supra* note 64, and accompanying text.

other U.S. jurisdictions confine the third party search to debtors of the debtors.<sup>127</sup> These non-parties have less reason to lie or hide debtor assets and therefore represent a credible source from which to corroborate or dispute debtor disclosure. The co-operation of the third parties is encouraged by expanded contempt powers of the court, allowing punishment of third parties for non-compliance. This is a sharp contrast to the Canadian model where creditors may seize the debtor's assets held by a third party but cannot compel the third party to supply information about debtor assets.

As discussed earlier, the New York model has potential for abuse; creditors could make sweeping demands for information without honest belief that the third party has knowledge. As costs of compliance cannot be passed on to the creditor requesting the information, there is nothing to deter such "fishing." Disinterested parties must absorb the cost of compliance or fight the request, also at their own expense. It seems an obvious modification to allow a third party to recoup costs from the creditor, especially if the search reveals no asset or information. Privacy protection is another concern. New York does not restrict the search group to businesses and information is provided directly to the creditor. The court is neither the screener nor custodian of the supplied information. The Canadian jurisdictions considering third party measures should address the forgoing risks by limiting information demands to debtors of debtors, requiring creditors to file a statement justifying the inquiry, or allowing third parties to pass compliance costs on to the creditor, imposing confidentiality and security obligations on the creditor and placing the court in the roles of screener and custodian of the information.

In the U.S., the integrity of the court's own records is protected by the requirement that a satisfaction document be filed with the court once the judgment has been collected – usually this burden is placed upon the creditor.<sup>128</sup> In California, creditors are exposed to liability if they do not file the necessary release.<sup>129</sup> This is a vast improvement over the Ontario system where a satisfaction order can only be obtained by a debtor upon filing the consent of a creditor or by motion to the judge.<sup>130</sup> The California practice of maintaining a list of unsatisfied judgments and imposing liability on creditors who fail to advise the court of full payment ensures accuracy in the court record, reduces the burden on the defendant, and eliminates the need for Ontario's costly court appearances. The imposition of liability on the creditor could also be a solution for controlling other improper post-judgment creditor behavior, such as harassing or threatening collection efforts or misuse of private information. Canadian jurisdictions should consider creating a statutory small claims court cause of action for debtors arising from a breach of post-judgment statutory obligations by creditors or their agents. Such a measure could discourage aggressive collection agency tactics without requiring the use of equitable relief, usually unavailable in Canadian jurisdictions.

The power to punish for contempt figures prominently in the U.S. models as a means of ensuring that court orders and demands for information are not ignored by either parties or non-parties. The U.S. small claims courts retain control over their own contempt process and do not upload *ex facie* contempt issues to a higher court.<sup>131</sup> This is considered ideal for ease of use by the parties and also for perceived effectiveness and strength of the court. The extent to which Canadian jurisdictions can mirror this format will depend upon the status of their adjudicators

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<sup>127</sup> California and Nevada.

<sup>128</sup> Florida; New York debtors are allowed to file the satisfaction to get their names off the list: *supra* note 68.

<sup>129</sup> *Supra* notes 104, 105, and accompanying text.

<sup>130</sup> O. Reg. 258/98 as amend., Rule 20.12 (Ont.).

<sup>131</sup> Nevada and California.

which varies across the country. Ontario's proposal to return the contempt proceedings to the small claims court but, with minor consequences, would not appear to create a perception of effectiveness and strength and does not address the underlying constitutional problem.<sup>132</sup>

The integrity of the Canadian small claims courts needs to be protected with measures that ensure the accuracy of information obtained and supplied by the court, that encourage compliance with court orders, and that protect parties and non-parties from abuse. Presenting the court as an effective, reliable, and trusted venue advances the reputation of the administration of justice as a whole. The Ontario Civil Legal Needs project found that 82% of respondents identified courts as important for the protection of their legal rights<sup>133</sup> and therefore, preserving the integrity of the small claims court should be an access to justice priority.

#### *D. Canadian Contribution*

Although novel creditor tools abound in the U.S. models, there are fewer unique debtor accommodation initiatives and protections. Some measures also seem to lack balanced consideration between creditor and debtor interests and may damage the integrity of the court in the eyes of the public. The most glaring examples are in the New York system which separates out business plaintiffs, a move one would expect to be taken to protect consumers and maintain the focus on the "peoples" court. However, little debtor relief or privacy protection is offered and New York's sweeping power to examine anyone suspected of having knowledge of the debtor's assets seems an obvious tool for abuse. Non-parties are exposed to uncontained costs of time and money incurred when complying with demands for debtor information and offered little protection from the inevitable "fishing expeditions." The burden remains on the non-party to challenge the demand. Treble damage liability is an extreme penalty imposed on New York business debtors with multiple unsatisfied judgments and appears harsh to this outside observer. Compliance would seem to be more likely achieved through the threat of the loss of a business license than with yet another monetary penalty. The deficiencies in the New York system could be addressed by softening the state's creditor heavy perspective with the adopting the recommendations described above for Canada. At the very least, the allocation of the costs of satisfying third party information demands must be re-examined.

None of the U.S. models addresses consolidation of multiple judgments into one payment plan and only California includes the express power to halt interest. U.S. jurisdictions could benefit from incorporating some Ontario initiatives in this area. The power to consolidate all outstanding judgments under one payment plan allows the court to consider the bigger picture of the debtor's circumstances and provides the debtor with some relief or control over his or her financial resources. It may encourage debtor participation in the process by offering added benefit and motivation to present a complete financial picture. It is recommended that this become a court-initiated measure in U.S. jurisdictions, where the record of unsatisfied judgments could flag all of a debtor's outstanding judgments and place them before the court in preparation for the assessment of financial circumstances at the conclusion of the trial. Similar to a trustee's meeting in a bankruptcy case, existing creditors would be given notice of pending consideration and invited to make written or oral submissions. Attending would give existing creditors a chance to obtain current financial information from the debtor. Any resulting payment arrangement could incorporate all the small claims creditors and deal with the accrual of interest and collection of payments in a comprehensive way.

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<sup>132</sup> *Supra* notes 33, 34, and accompanying text.

<sup>133</sup> OCLN, *supra* note 10, at 19.

Privacy protections also figure prominently in the current Ontario model.<sup>134</sup> The court controls the exchange of information in closed proceedings. The transcript of the proceedings may only be ordered by the creditor, debtor, or the court and creditors must use the information for only debt collection purposes and destroy it securely once the debt is satisfied.<sup>135</sup> More control over the collection, use, and dissemination of the very sensitive financial information of the debtor should be incorporated into both the U.S. and Canadian models beginning with making the court the custodian and guardian of the information. Liability should be imposed upon creditors and their agents for misuse or insecure storage of the information. The search for information involves dissemination of private information of the debtor and there should be limits to the sharing of this information by creditors.

Finally, as in Ontario, gaps in procedure should be filled by incorporating higher court provisions into the small claims court. Qualifying statements should limit the adoption to only those provisions not in express or implied conflict with the terms or spirit of the express small claims court provisions. These modifications strike the appropriate balance between fully empowering the court while preserving its debtor accommodation and people's court spirit.

## **VI. CONSOLIDATED RECOMMENDATIONS FOR REFORM**

The following reform recommendations will enhance the access to justice features of the post judgment collection phases of both Canadian and U.S. small claims courts. Faster, easier to use, and more balanced collection processes should improve collection success for creditors and encourage voluntary compliance among debtors. Incorporated into the suggested features are the themes of early intervention, court driven initiatives, system integrity, debtor accommodation and protection of privacy, as discussed above. Jurisdictions in both Canada and the United States should consider modifying their existing systems to adopt the following features where they do not already exist.

### *A. Written Financial Disclosure at the Time of Trial*

Small claims court rules should require that financial disclosure forms (FDF) be automatically sent by the court to both parties prior to trial. A judgment debtor should be required to file the completed form with the court at the time that judgment is rendered.

### *B. Debtor Examination and Accommodation at the Time of Trial*

Small claims court rules should require that a trial judge review the FDF, and share its contents with the judgment creditor at the conclusion of the trial. At the point of judgment, an inquiry into the debtor's ability to pay, sources of income and the whereabouts of assets should be mandatory. The judge should be given discretion to accommodate a debtor's limited ability to pay by delaying the entry of the judgment, suspending execution of the judgment to a future date,

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<sup>134</sup> Legislation governing privacy of personal information includes the Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F-31, §§ 21, 37-49(Ont.); PIPEDA, *infra* 133, O. Reg 258/98 as amend., R. 20.10(6).

<sup>135</sup> PIPEDA, *supra* note 65, §§ 7(1)(b), 7(2)(d), 7(3)(b), 7(5)(debt collection exceptions); O. Reg 258/98 as amend., R. 20.10(6)(Ont.)(private proceedings).

ordering installment payments, setting a fixed amount for garnishments, extending time for payment, suspending some or all of a creditor's remedies, ordering payments into court or by such other means as the judge deems appropriate. A request from the debtor should not be a prerequisite to the exercise the judicial discretion to accommodate.

*C. Default Judgments and Written Financial Disclosure*

Where the judgment debtor has not participated in the trial, the small claims court rules should require that a FDF be mailed to the judgment debtor with notice of the default judgment. The judgment should set a 30 day time limit for the return of the form to the court. Thereafter, its contents should be shared with the judgment creditor.

*D. Failure to Provide Financial Disclosure Punishable by Contempt Proceedings*

Small claims court rules should state that any failure to complete and file the FDF as required under the rules is punishable by contempt proceedings initiated by the court. False, incomplete or partial disclosure shall be viewed as a failure to comply with the rules. Contempt proceedings should be housed and managed within the small claims court, rather than superior court, system.

*E. Subsequent Debtor Examinations*

The small claims court rules should allow creditors to request a subsequent debtor examination where no examination was conducted at trial, no FDF was filed or where questions or concerns arise from the information supplied on the FDF. Normally, it would be the creditor's responsibility to request and serve an appointment for such an examination. However, debtors who were absent from the trial or have experienced a change of circumstances since the trial should also be able to request and serve such an appointment for reconsideration of accommodation.

*F. Databank of Outstanding Judgments*

The small claims court should maintain a databank of outstanding judgments searchable under creditor or debtor name. It should include the date and original amount of the judgment, the amount outstanding. It should also note whether the judgment is subject to an arrangement to pay and whether payments are current. Personal information of the debtor supplied on the FDF should not be included in the databank and should be protected from access by the public, stored securely and destroyed upon satisfaction of the judgment.

*G. Consolidation of Outstanding Payment Arrangements*

As part of the aforesaid inquiry into the debtor's ability to pay, a trial judge should be empowered to consider, modify or consolidate other existing payment arrangements into the new order. Small claims court procedures should require the clerk to supply a trial judge with the databank's list of outstanding judgments affecting the parties. Existing judgment creditors of affected parties should be given notice of the upcoming trial so they may attend and make submissions.

*H. Notice of Satisfaction or Partial Payment of Judgment*

When a judgment is paid in full, the small claims court rules should require a creditor to file a notice of satisfaction with the court within 20 days of receipt of the last payment. Where judgment is collected in installments, the creditor should be required to provide the court with regular updates regarding the status of the payments.

*I. Creditor Liability*

The small claims court rules should create a civil cause of action for debtors who are harmed by a creditor's wrongful behavior. Wrongful behavior should include failure to accurately and properly advise the court of the status of an outstanding judgment, and failure to properly and securely use, store or destroy debtor financial information.

*J. Power to Control Improper Creditor Collection Behavior*

The small claims court should be given the power to grant equitable relief in order to control improper creditor collection behavior. This should include the power to award injunctive and declaratory relief. The above described civil cause of action should extend to cover damages suffered by a debtor as a result of improper collection behavior.

*K. Gaps in the Rules*

The rules of the small claims court should include a saving provision allowing gaps to be filled by analogy to the rules of the superior court not in conflict with the spirit or express provisions of the small claims court rules.

*L. Collection During Appeal Period*

The small claims court rules should require funds collected during the appeal period to be paid into court and held pending expiration of the appeal. Installment payment arrangements included in judgments should require similar payment into court.

Noticeably absent from the forgoing recommendations are the New York court's broad powers to compel information from third parties and to monetarily punish delinquent debtors and Nevada's appeal bond requirement. As discussed in the forgoing section of the paper, these measures seem heavy handed, one-sided, likely to violate privacy rights, or unlikely to yield a change in behavior. Recommendations were formed with the expectation that they could improve collection success among creditors, encourage voluntary compliance by debtors, offer timely accommodation to sincere debtors in need, make the system faster, easier, more reliable and transparent for users and the public at large.

## VII. CONCLUSION

Charting the path between the hope of full compliance and fear of unwarranted debtor relief remains a constant challenge. The above described reform recommendations promote improved access to justice in the post-judgment enforcement models of the small claims courts in

U.S and Canadian jurisdictions. Access to justice requires something more than merely riding the coat tails of the superior court model and the small claims court mandate of quick, easy, and inexpensive dispute resolution must be reflected in both the pre- and post-judgment phases of the process.

There are three important lessons learned from the assessment of the various models reviewed herein. Early intervention can speed the collection process and reduce its costs while making the process more user-friendly. Court initiated steps can remove some of the burdens on the parties and also make the process easier to use. Protecting the integrity of the system with checks and balances to ensure the accuracy of the information and compliance with its order will enhance the effectiveness of the court, improve its reputation in the eyes of the public, and benefit the administration of justice as a whole. The small claims court is a vital component of a multi-faceted strategy to promote access to justice, and the foregoing reform recommendations will enhance its contribution.